PUBLIC VERSION

**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA,<br><br>Complainant,<br>v.<br><br>DUKE ENERGY PROGRESS, LLC,<br><br>Defendant. | Proceeding No. 20-293<br>Bureau ID No. EB-20-MD-004 |

**REPLY SUPPLEMENTAL BRIEF**

**BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA**

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* Certain information in this Reply Supplemental Brief and its Exhibit has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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## I. INTRODUCTION AND SUMMARY

Duke Progress's supplemental brief confirms that the just and reasonable rate for AT&T is the competitively neutral new telecom rate guaranteed AT&T's competitors, which is about $7.40 per pole. Duke Progress's effort to charge AT&T rates over [redacted] times higher is based on speculation about a hypothetical world without jointly used utility poles, "dummy" estimates of work Duke Progress never performed, and false claims about pole space that are based on patently incorrect and inherently biased data. Duke Progress has not identified, much less proven with clear and convincing evidence, a net benefit that it provides AT&T under the JUA "that materially advantages [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[1] Nor has it accounted for the significant competitive *disadvantages* the JUA imposes on AT&T.[2] The just and reasonable rate, therefore, is the approximately $7.40 per pole new telecom rate that fully compensates Duke Progress and is essential to the Commission's deployment and competition goals.[3]

## II. ARGUMENT

### A. Duke Progress Misstates the Burden of Proof.

Duke Progress goes beyond the Enforcement Bureau's supplemental briefing request by arguing that it does not need to prove its rates are just and reasonable.[4] To the contrary, Duke Progress, not AT&T, bears the burden of proof. This is a "complaint proceeding[ ] challenging

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[1] 47 C.F.R. § 1.1413(b).

[2] *See* AT&T Initial Suppl. Br. at 2-12 ("AT&T Br.").

[3] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*") ("The [new telecom] rate is just, reasonable, and fully compensatory."); *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705, 7769 (¶ 126) (2018) ("*Third Report and Order*") ("[W]e agree … that greater rate parity between incumbent LECs and their telecommunications competitors 'can energize and further accelerate broadband deployment.'").

[4] Duke Initial Suppl. Br. at 14-15, 23 ("Duke Br."). *See* Letter Order at 2 (Mar. 8, 2021).

utility pole attachment rates" under a newly renewed JUA; so Duke Progress must prove by clear and convincing evidence that it provides AT&T net benefits under the JUA "that materially advantage[ ] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles" to charge a rate between the new and old telecom rates.[5] This regulation does not carve complaint proceedings into different time periods subject to different standards.[6] Nor can it countenance the JUA rates, which are over [redacted] times the new telecom rate and [redacted] times the old telecom rate.[7]

Indeed, the Commission has always placed the burden on the pole owner to justify charging a rate higher than the regulated rate, as just and reasonable rates are cost-based rates designed to compensate—but not over-compensate—the pole owner.[8] And so, regardless of whether this case is reviewed under the standard the Commission adopted in 2011 or 2018, Duke Progress cannot avoid its burden to "justify 'the rate ... alleged in the complaint not to be just and reasonable.'"[9] The

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[5] 47 C.F.R. § 1.1413(b).

[6] *Id.*; *Adams Telcomm'cn, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) ("[I]t is elementary that an agency must adhere to its own rules and regulations.") (citation and quotation omitted).

[7] Compl. Ex. A at ATT00007, ATT00010 (Rhinehart Aff. ¶¶ 12, 18).

[8] *See, e.g.*, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13745 (¶ 29) (2015) ("*Cost Allocator Order*") (Congress "enact[ed] cost-based rate formulas"); *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) ("*Dominion Order*") (a pole owner may not recover "costs that [it] does not incur"); *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (a pole owner may not charge a higher rate when it does not "incur[ ] any additional costs in preparing or maintaining its poles as a result of [the] installation of fiber optic cables" as compared to "coaxial cable").

[9] Duke Progress did not and cannot dispute that AT&T made a *prima facie* case with a "statement of the specific unreasonable pole attachment rate." *See Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996); *see also Cable Television Ass'n of Ga. v. Ga. Power Co.*, 18 FCC Rcd 16333, 16337 (¶ 8) (2003). The burden to justify the JUA rates therefore is on Duke Progress. *Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24635 (¶ 49) (2003) ("[A]fter [the complainant] establishes a *prima facie* case ..., [the utility] must produce evidence explaining the challenged charges."); *Marcus Cable Assocs. v. Tex. Utils. Elec. Co.*, 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the [utility] bears a burden to explain or defend its actions.");

Commission "shall" ensure "just and reasonable" pole attachment rates in all cases, including this case where AT&T does not receive net material competitive benefits under the JUA.[10]

### B. Duke Progress Does Not Identify, Prove, or Properly Quantify the Value of Net Material Competitive Advantages Provided Under the JUA.

Duke Progress alleges that the JUA provides AT&T with eight competitive advantages (also referred to as "benefits"). In reality, its list is duplicative, can be boiled down to four alleged benefits, and even then, does not demonstrate or properly quantify the value of net material competitive benefits provided by the JUA.

*1.* ***"Built-to-Suit" Network.*** Duke Progress claims that AT&T is competitively advantaged because Duke Progress installed joint use poles when it could have installed shorter non-joint use poles to meet its own electric service needs.[11] The Commission has repeatedly rejected this argument.[12] AT&T *and* its competitors require Duke Progress's joint use poles and have for many decades. Duke Progress "did not build its poles just to accommodate AT&T."[13]

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*Heritage Cablevision*, 6 FCC Rcd at 7105 (¶ 29) ("Our procedural rules require the respondent to justify 'the rate ... alleged ... not to be just and reasonable.'").

[10] 47 U.S.C. § 224(b); *see also Selkirk Commc'ns v. FPL*, 8 FCC Rcd 387, 389 (¶ 17) (CCB 1993) ("[P]ole attachment rates cannot be held reasonable simply because they have been agreed to."). Duke Progress faults AT&T for not quantifying net competitive benefits, Duke Br. at 14-15, but there are none. Duke Progress relies on an interim decision where quantification was requested based on a finding that the ILEC "concede[d] that it received and continues to receive benefits under the Agreement that are not provided to other attachers." *Id.* at 14 (quoting *Verizon Fla. v. FPL*, 30 FCC Rcd 1140, 1149 (¶ 24) (EB 2015)). That is not the case here.

[11] Duke Br. at 2-3 (rows A, C, D), 4-10 (Arguments A, C-E); Answer ¶ 16 (arguing that "DEP ... has always installed poles taller and stronger than necessary to meet only DEP's service needs").

[12] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (alleged competitive advantages must be "beyond basic pole attachment ... rights"); *BellSouth Telecommc'ns v. FPL*, 35 FCC Rcd 5321, 5330 (¶ 15) (EB 2020) ("*FPL 2020 Order*"); *Verizon Md. v. Potomac Edison Co.*, 35 FCC Rcd 13607, 13619-20 (¶ 32) (2020) ("*Potomac Edison Order*").

[13] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); Compl. Ex. C at ATT00040 (Peters Aff. ¶ 12); Compl. Ex. D at ATT00071-72 (Dippon Aff. ¶ 40); Reply Ex. C at ATT00390 (Peters Reply Aff. ¶ 8).

Duke Progress nonetheless relies on its rejected "built to suit" theory to argue that AT&T avoided (1) make-ready costs and (2) permitting and inspection costs that AT&T *may have* incurred had it replaced "virtually every" Duke Progress pole with a taller pole in order to attach.[14] This argument fails for at least four reasons.

*First*, this alternate universe does not exist. No communications company—ILEC, CLEC, or cable—has needed to replace any material number of Duke Progress's poles in order to attach.[15] One of Duke Progress's exhibits shows that by 1972 (*i.e.*, 28 years *before* the JUA was entered) [redacted][16] This remains true. In a September 2020 filing, Duke Progress's parent company, joined by other electric utilities, stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility.[17] In a January 2021 filing, Duke Progress's parent company again emphasized that its utility poles are "almost always capable of hosting an additional attachment."[18] In this record, Duke Progress's witness describes a 40-foot pole as its "typical" pole *without* AT&T attached.[19] There is ample room on a 40-foot pole for AT&T and its competitors to attach without replacing it.[20] It is mere fiction to claim that AT&T would have rebuilt Duke

[14] *See* Duke Br. at 2 (row A), 2-3 (rows C & D), 4-5.

[15] *See* Reply Ex. C at ATT00391-392 (Peters Reply Aff. ¶¶ 9-10); Reply Ex. F at ATT00462 (Dippon Reply Aff. ¶ 52).

[16] *See* Answer Ex. 2 at DEP000180.

[17] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020); *see also* Reply Ex. C at ATT00392 (Peters Reply Aff. ¶ 10).

[18] Ex Parte of Duke Energy Corp., et al. at 2, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Jan. 29, 2021).

[19] Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14).

[20] The JUA acknowledges that AT&T can attach to poles shorter than 40 feet without replacing them, Compl. Ex. 1 at ATT00094 (JUA, Art. I.K), and the Commission's regulations presume there

Progress's network absent the JUA.[21] Indeed, AT&T had facilities attached to over 84 percent of the joint use poles owned by Duke Progress *before* the JUA was entered in 2000.[22]

*Second*, AT&T does not avoid pole replacement, make-ready, permitting, or inspection costs that its competitors incur.[23] If an existing Duke Progress pole needs to be replaced to accommodate an additional communications facility, it does not matter whether the additional facility is AT&T's or AT&T's competitor's; the same work is required.[24] And under the JUA, AT&T incurs the cost to complete the work, or pays Duke Progress for work it asks Duke Progress to perform.[25] There are no avoided costs.

Duke Progress tries to create the illusion of value where none exists by (1) manufacturing a difference between "tabulated" and "actual" make-ready costs, (2) asking the Commission to ignore "internal costs incurred by AT&T" and focus only on "the costs that AT&T is required (or not required) to pay" to Duke Progress, and (3) claiming that it double-checks AT&T's inspections.[26] But first, there should be no difference between "tabulated" and "actual" costs because the JUA states that the "tabulated" costs reflect "the cost" to perform the relevant work, provides for the

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is space for Duke Progress and 4 communications attachers on a 37.5-foot pole, 47 C.F.R. §§ 1.1409(c), 1.1410. *See also* Compl. Ex. C at ATT00040 (Peters Aff. ¶ 12); Reply Ex. C at ATT00391-392 (Peters Reply Aff. ¶ 9); Reply Ex. F at ATT00462 (Dippon Reply Aff. ¶ 51).

[21] *See* Reply Ex. C at ATT00390-392 (Peters Reply Aff. ¶¶ 8-10); Reply Ex. D at ATT00417-418 (Dalton Reply Aff. ¶¶ 13-14).

[22] Reply Ex. F at ATT00461 (Dippon Reply Aff. ¶ 50).

[23] Compl. Ex. C at ATT00041, ATT00043 (Peters Aff. ¶¶ 13, 16); Reply Ex. C at ATT00401- 404 (Peters Reply Aff. ¶¶ 28-31); Reply Ex. D at ATT00413-416 (Dalton Reply Aff. ¶¶ 5-10); Reply Ex. E at ATT00426-428 (Oakely Reply Aff ¶¶ 5-9).

[24] Reply Ex. C at ATT00392 (Peters Reply Aff. ¶ 10); Reply Ex. D at ATT00414, ATT00417-418 (Dalton Reply Aff. ¶¶ 8, 13-14); Reply Ex. E at ATT00427-428 (Oakley Reply Aff. ¶ 9).

[25] Compl. Ex. 1 at ATT00096-101 (JUA, Arts. VI-XI); Compl. Ex. C at ATT00041, ATT00043 (Peters Aff. ¶¶ 13, 16); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413-416 (Dalton Reply Aff. ¶¶ 6, 9-10); Reply Ex. E at ATT00426-428 (Oakley Reply Aff. ¶¶ 5, 8).

[26] *See* Answer ¶¶ 8, 14, 17; Duke Br. at 8-9.

costs to be updated annually to reflect cost trends, and authorizes "actual cost" billing should a party refuse a request to update the cost schedules.[27] Duke Progress creates an artificial difference by comparing the lowest cost pole replacement under the JUA to Duke Progress's average cost to replace poles of all heights *and* to complete all associated work.[28] Second, the Commission cannot ignore AT&T's internal costs and Duke Progress may not lawfully "charge a higher rate" where an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[29] And third, this is true even if Duke Progress decides to double-check AT&T's work, as this is work Duke Progress need not perform under the JUA and does not perform because of it.[30]

*Third*, Duke Progress's theory that AT&T would have replaced every Duke Progress pole because it would have been the "first communications attachment" is incompatible with the reality of increased competition in the communications marketplace and the resultant incremental development of the communications network by AT&T's competitors.[31] Cable companies and

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[27] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[28] *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35); *see also* Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that Duke Progress's "equipment transfer costs" are "a significant component" of its [redacted] cost estimate); Reply Ex. C at ATT00406 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶ 10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[29] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67); *see also* Compl. Ex. D at ATT00071 (Dippon Aff. ¶ 39).

[30] *See* Compl. Ex. 1 at ATT00096, ATT00100 (JUA, Arts. VI, VIII(B)); Compl. Ex. C at ATT00041 (Peters Aff. ¶ 13); Reply Ex. C at ATT00402-404 (Peters Reply Aff. ¶¶ 29-30); Reply Ex. D at ATT00414 (Dalton Reply Aff. ¶ 7); Reply Ex. E at ATT00426-427 (Oakley Reply Aff. ¶ 6); *see also* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020) (alleged advantages must "derive from the terms and conditions of the joint use agreement"). It is not clear what uncompensated work Duke Progress claims to perform for AT&T, particularly when it admits that it does *not* perform "pre-construction and post-construction inspections" out of "deference" to ILECs. *See* Answer ¶ 14.

[31] *See* Duke Br. at 5.

CLECs have used space on Duke Progress's poles for decades and in greater numbers.[32] Duke Progress's interrogatory responses show that over [redacted] cable company and CLEC attachments on Duke Progress's poles are governed by agreements that *pre-date* the JUA—more than [redacted] the number of Duke Progress's poles covered by the JUA.[33] It is simplistic and incorrect to assume AT&T was the first to attach to each of Duke Progress's poles.[34]

*Fourth*, Duke Progress's quantifications are hypothetical and grossly inflated.[35] Contrary to reality, Duke Progress assumes replacement of 100% of Duke Progress's poles[36] and then prices those replacements, which would have occurred years or decades ago, using *current day* materials and costs.[37] Duke Progress also inflates those current costs with pole replacements of all types and heights, rather than the lower-cost pole replacements that would be consistent with its theory that 30- or 35-foot poles would have been replaced with 40-foot poles.[38] The result is an absurd

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[32] *Potomac Edison Order*, 35 FCC Rcd at 13619-13620 (¶ 32) ("By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and [C]LECs a statutory right of access."); *see also FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); Reply Ex. A at ATT00366 (Rhinehart Reply Aff. ¶ 33).

[33] *See* Duke Progress's Supp. Resp. to Interrog. No. 2, Ex. 1 at DEP000406-407 (stating that, in 2019, over [redacted] and 148,064 AT&T attachments were covered by the 2000 JUA); *see also* Reply Ex. C at ATT00390 (Peters Reply Aff. ¶ 8) (analyzing initial interrogatory response).

[34] It is also incorrect to assume that AT&T attached to every Duke Progress pole under the JUA because the joint network *predates* the JUA by decades. *See* Compl. Ex. 1 at ATT00093 (JUA, Whereas Clause); Answer Ex. 2 at DEP000138-167 (superseded 1977 JUA).

[35] Reply Ex. A at ATT00363-364 (Rhinehart Reply Aff. ¶ 30); Reply Ex. F at ATT00457-463 (Dippon Reply Aff. ¶¶ 46-54).

[36] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020); *see also* Reply Ex. C at ATT00392 (Peters Reply Aff. ¶ 10); Reply Ex. F at ATT00457-462 (Dippon Reply Aff. ¶¶ 46-52).

[37] *Ala. Cable Telecommcn's Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt ... using replacement costs ... fails."); Reply Ex. A at ATT00363-364 (Rhinehart Reply Aff. ¶ 30); Reply Ex. F at ATT00463 (Dippon Reply Aff. ¶ 54).

[38] Duke Progress's Supp. Resp. to AT&T's Interrog. (pdf titled "Pole Replacement Cost Data (DEP)"); Answer Ex. A at DEP000260 (Freeburn Decl. ¶ 35); Answer Ex. C at DEP000298

quantification suggesting that AT&T should have paid [redacted] per pole—or [redacted]—to replace about 16% of Duke Progress's distribution network, when Duke Progress has invested *less* in all of its [redacted] distribution poles.[39]

In addition to the pole replacement costs, Duke Progress claims that AT&T should have paid unsubstantiated current day permitting and inspection fees of over [redacted], which it says translates to an annual cost of [redacted] per pole.[40] Of course, Duke Progress did *not* perform work that could justify these fees, so Duke Progress may not embed retroactive or prospective recovery of them in AT&T's rate.[41] Equally important, in claiming that AT&T should have paid [redacted] per pole when deploying its facilities years or decades ago, Duke Progress ignores that AT&T *did* pay Duke Progress JUA rates that were up to [redacted] per pole *higher* than the regulated rates AT&T's competitors paid.[42] Duke Progress has been excessively over-compensated.

*2.* ***Evergreen Provision.*** Duke Progress next claims that AT&T is advantaged by a contractual right to maintain its existing attachments on Duke Progress's poles should the JUA terminate.[43] This is not a competitive advantage either—Duke Progress admits that AT&T's competitors have an "extracontractual" right to remain attached to Duke Progress's poles.[44]

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(Burlison Decl. ¶ 12) ("In other words, where Carolina Power & Light Company installed 40-foot poles to meet the [JUA]'s requirements, in the absence of the [JUA], it could have installed 30 or 35-foot poles."); Reply Ex. F at ATT00462-463 (Dippon Reply Aff. ¶ 53).

[39] Reply Ex. A at ATT00363-364 (Rhinehart Reply Aff. ¶ 30); Answer Ex. E at DEP000375 (Metcalfe Decl., Ex. E-4.1).

[40] *See* Answer Ex. E at DEP000377 (Metcalfe Decl., Ex. E-4.2).

[41] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18); *Heritage Cablevision.*, 6 FCC Rcd at 7105 (¶ 29); Reply Ex. C at ATT00403-404 (Peters Reply Aff. ¶ 30); Reply Ex. D at ATT00413-414 (Dalton Reply Aff. ¶¶ 6-7); Reply Ex. F at ATT00426-427 (Oakley Reply Aff. ¶ 6).

[42] Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12); Reply Ex. C at ATT00404 (Peters Reply Aff. ¶ 31); Reply Ex. F at ATT00467-469 (Dippon Reply Aff. ¶¶ 60-64).

[43] Duke Br. at 6-7 (Argument B), 12 (Argument G).

[44] Answer ¶ 30 n.136.

Indeed, the statutory right of access enjoyed by AT&T's competitors is *more valuable* than AT&T's contractual right.[45] If Duke Progress terminates a license agreement, AT&T's competitor still has a federally protected right to maintain its attachments on Duke Progress's poles *and* deploy on new Duke Progress pole lines.[46] But if Duke Progress terminates the JUA, AT&T will have no continuing right of access to new pole lines and will need to identify, fund, and deploy alternate infrastructure going forward—provided governmental entities would allow such unnecessarily duplicative infrastructure in the public rights-of-way.[47]

Duke Progress ignores federal law and instead points to language in its license agreements stating that attachments must be removed upon termination of the agreement.[48] But this language is invalid and unenforceable; a federal statutory right to attach "may not be defeated by private contractual provisions."[49] As a matter of law, Duke Progress cannot "impede … the installation and maintenance of telecommunications and cable equipment" on its poles.[50]

Duke Progress's alleged quantification is contrary to precedent as well because an alleged advantage cannot be valued "by assuming that, without the JUA, AT&T would have built a duplicative pole network."[51] Duke Progress goes even further—assuming that AT&T would incur

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[45] *See* AT&T Br. at 2-4, 11-12; *see also* Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9); Reply Ex. A at ATT00363 (Rhinehart Reply Aff. ¶ 29); Reply Ex. C at ATT00392-394 (Peters Reply Aff. ¶¶ 11-13); Reply Ex. F at ATT00455-456 (Dippon Reply Aff. ¶ 42). Indeed, electric utilities, including Duke Energy, previously argued that rental rates should increase to account for the higher value of statutory access versus the less advantageous access AT&T has via contract. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1365 (11th Cir. 2002).

[46] 47 U.S.C. § 224(f).

[47] *See* Answer ¶ 11 n.30 ("[I]LECs have no right of access to utilities' poles) (citation omitted).

[48] Duke Br. at 6.

[49] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50).

[50] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16059-60 (¶ 1123) (1996) ("*Local Competition Order*"); *id.* at 16074 (¶ 1160) ("[A] utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement").

[51] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Ala. Cable Telecommcn's Ass'n*, 16 FCC Rcd at

the cost of a duplicative network *and* additional costs to "acquir[e] land and … equipment to store [148,000+] poles in inventory" to protect against the risk that the JUA may terminate.[52]

This is an exercise in make-believe. No company has or will deploy a duplicative network.[53] Duke Progress does not claim its CLEC or cable attachers have stockpiles of poles in case Duke Progress terminates their license agreements. And so Duke Progress bases its quantification on "dummy work orders," claiming AT&T should pay Duke Progress amounts that no entity has ever incurred.[54] And even the "dummy work orders" lack credulity, as Duke Progress assumes each pole would be installed as a standalone job, without the efficiencies of scale that would necessarily be part of such a massive project. Duke Progress's value quantification, "using replacement costs[,] … fails."[55]

*3.* ***Space on Duke Progress's Poles.*** Duke Progress next claims that AT&T is advantaged by 3.33 feet of safety space on its poles and 3 feet of space allocated to, but not used by, AT&T in a prior superseded JUA.[56] These are not competitive advantages.[57] The JUA does *not* include a space allocation; the Commission invalidated contractual space allocations a quarter-

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12232 (¶ 52) (the same rate "provides just compensation" regardless of "whether the [pole] attachment is obtained through voluntarily signed contracts or through mandatory access.").

[52] *See* Duke Br. at 6-7, 12.

[53] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) ("[A]s Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is 'often no practical alternative except to utilize available space on existing poles'"); *see also* Reply Ex. A at ATT00363 (Rhinehart Reply Aff. ¶ 29); Reply Ex. C at ATT00393-394 (Peters Reply Aff. ¶ 12).

[54] *See* Duke Progress's Supp. Resp. to AT&T's Interrog. at DEP001386-1465.

[55] *Ala. Cable Telecommcn's Ass'n*, 16 FCC Rcd at 12234 (¶ 57); *see also* Reply Ex. A at ATT00362-363 (Rhinehart Reply Aff. ¶¶ 28-29); Reply Ex. F at ATT00445-457, ATT00465-466 (Dippon Reply Aff. ¶¶ 41-45, 57).

[56] Duke Br. at 9-10 (Argument E), 10-11 (Argument F).

[57] *See* AT&T Br. at 8-10, 17-20; *see also* Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. A at ATT00364 (Rhinehart Reply Aff. ¶ 31); Reply Ex. C at ATT00394-401 (Peters Reply Aff. ¶¶ 14-27); Reply Ex. F at ATT00445-451 (Dippon Reply Aff. ¶¶ 21-32).

century ago.[58] And "the Commission has long held that the ... safety space is for the benefit of the electric utility, not communications attachers."[59]

Duke Progress tries to salvage its allegations about space by claiming that AT&T pays for space on a per-pole basis when its competitors pay "a per-attachment rate premised upon a single foot of occupancy."[60] Of course, there is no valid evidence that AT&T uses more than the one foot of space presumptively occupied by AT&T and its competitors.[61] And regardless, federal law and Duke Progress's license agreements, which [redacted],[62] entitle AT&T's competitors to rates calculated using the Commission's new telecom rate formula, which "determine[s] the maximum just and reasonable rate *per pole*."[63] A per-pole rate is not a

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[58] *See* Compl. Ex. 1 at ATT00091-110 (JUA); *Local Competition Order*, 11 FCC Rcd at 16079 (¶ 1170).

[59] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space ... is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied"); *see also* Answer ¶ 12 n.38 ("[T]he Commission has already determined that CATV and CLEC attachers should not bear this cost...").

[60] Duke Br. at 11.

[61] *See* AT&T Br. at 12-15; *see also* Section II.C, below. Recent decisions confirm the accuracy of the 1-foot presumption for ILEC facilities. *See Potomac Edison Order*, 35 FCC Rcd at 13624 (¶ 37) (finding that, when field data is adjusted to subtract 6 inches of clearance improperly added to the space occupied by Verizon, the field data's "conclusion [falls] within the Commission's default input"); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16 n.70) (stating that "FPL admits ... AT&T's attachments occupy only 1.18 feet of space" without considering whether FPL improperly assumed AT&T occupies 6 inches of space below its facilities).

[62] *See* AT&T Br., Ex. 2 line 7.

[63] *See Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added). If a pole owner has sufficient survey data to show that an attacher occupies more than 1 foot of space, on average, it may adjust the "space occupied" input in the rate formula to account for that additional space. A pole owner may not multiply a 1-foot telecom rate (new or old) by the amount of space occupied. *See* 47 C.F.R. § 1.1406(d); 47 U.S.C. § 224(e)(2) (requiring that unusable space be equally divided among "attaching *entities*," not attachments) (emphasis added); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6805 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each

competitive benefit provided to AT&T by the JUA; it is a right federal law extends to all communications attachers.

Duke Progress's alleged valuation also fails. Safety space cannot "be attributed to AT&T."[64] And there is no valid basis for adding a premium to the new telecom rate based on pole space, as new telecom rates are already calculated with a "space occupied" input.[65]

*4. **Typical Location on Duke Progress's Poles.*** Finally, Duke Progress claims that AT&T's typical location as the lowest communications attacher is a competitive advantage, even though it has conceded that there are "costs and risks attendant to the lowest position" on its poles.[66] It nonetheless seeks an unquantified rental rate premium based on claims of benefits that are contradicted by the record. First, AT&T's competitors sometimes attach below AT&T's facilities and are not *obligated* to attach above AT&T's facilities as Duke Progress wrongly contends.[67] Second, AT&T cannot access its facilities easier, or transfer them to replacement poles sooner, as higher-placed facilities are transferred first.[68] Third, there is zero evidence that AT&T's facilities uniformly sag more mid-span than the facilities of its competitors or Duke Progress.[69] AT&T's

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foot or increment thereof").

[64] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16).

[65] *See* 47 C.F.R. § 1.1406(d)(2). Duke Progress also significantly and inappropriately inflates its valuation by using a per-attachment rate methodology that violates federal law. *See* Answer Ex. E at DEP000379-392 (Metcalfe Decl., Ex. E-5); *see also* Reply Ex. A at ATT00355-357 (Rhinehart Reply Aff. ¶¶ 15-17); Reply Ex. F at ATT00445 (Dippon Reply Aff. ¶ 20).

[66] Answer ¶ 19.

[67] Duke Br. at 4 (row H). *But see* Answer Ex. C at DEP000300 (Burlison Decl. ¶ 17) (stating AT&T is "almost always" the lowest communications attacher); Compl. Ex. C at ATT00045 (Peters Aff. ¶¶ 20-21); Reply Ex. C at ATT00396, ATT00407 (Peters Reply Aff. ¶¶ 17, 35).

[68] Duke Br. at 13. *But see* Compl. Ex. C at ATT00045-46 (Peters Aff. ¶ 22); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶ 36).

[69] Duke Br. at 13. *But see* AT&T Br., Ex. 10; Reply Ex. C at ATT00398-401 (Peters Reply Aff. ¶¶ 22-26); Reply Ex. D at ATT00421 (Davis Reply Aff. ¶ 21); Reply Ex. E at ATT00429-430 (Oakley Reply Aff. ¶ 13).

typical location on Duke Progress's poles does not warrant an increase from the fully compensatory new telecom rate.

### C. Duke Progress's Description of Its Field Data Confirms It Is Not Statistically Valid, Representative, or Accurate.

Duke Progress's brief confirms that the field measurements on which it relies for many of its allegations and rate inputs are fundamentally flawed, statistically invalid, and inherently unreliable. Duke Progress did not design or conduct a pole sample or survey that could satisfy the Commission's rules,[70] but seeks to use measurements its contractor purportedly collected during the third-party attachment application process. Perhaps for that reason, Duke Progress seems oblivious to the obvious flaws in its data. Surveys were performed on [redacted] identifiable poles, not 1,039.[71] The poles were clustered, with [redacted] of the poles in just [redacted] counties covered by the JUA, not "distributed throughout [Duke Progress]'s service area."[72] And using data collected during the third-party attachment process did *not* "contribute[ ] to the randomness of the sample," but ensured the opposite, filling the record with skewed data from measurements about lines of adjacent poles.[73]

Duke Progress's flawed data should not be used for any purpose. But even if it were valid, Duke Progress cannot cherry-pick the part of the data it wants to use, while asking the Commission to ignore data that is unfavorable. Yet that is precisely what it has done, asking the Commission to ignore the data's pole height measurements—showing poles of at least [redacted]-feet in height—and use the Commission's 37.5-foot pole height presumption instead.[74] Duke Progress's selective and results-oriented use of its data must be rejected.

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[70] *See* 47 C.F.R. § 1.363.

[71] Duke Br. at 21. *But see* AT&T Br., Ex. 7.

[72] Duke Br. at 20. *But see* AT&T Br., Exs. 5, 6

[73] Duke Br. at 20-21. *But see* Ex. 1 (Example of adjacent poles); AT&T Br., Exs. 5, 6.

[74] AT&T Br., Ex. 11.

### D. Duke Progress's New and Old Telecom Rate Calculations Violate Commission Orders and Regulations.

To simplify this case, AT&T stipulated to several inputs, including the distribution plant depreciation rates, because of their minimal impact on the resulting rate.[75] Although Duke Progress confusingly briefs this stipulated (though disputed) input, it need not be resolved on the merits.[76] AT&T's stipulation eliminated the need for further briefing and decision on it.

The parties' remaining disputes are few but showcase the ways Duke Progress seeks to manipulate the Commission's rate formulas to artificially increase rates.[77] With respect to cost inputs, Duke Progress increased rates with the values it selected for the 2 remaining inputs in dispute.[78] Duke Progress then substantially increases rates with its space factor inputs—arguing that AT&T should pay rates calculated based on space AT&T does not occupy and an average number of attaching entities input that it does *not* use for "other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[79] The result is an old telecom rate that far exceeds the rate intended to "account for particular arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers" at

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[75] *See* AT&T Br., Ex. 3.

[76] *See* Duke Br. at 19.

[77] *See Cost Allocator Order*, 30 FCC Rcd at 13740 (¶ 20) ("[I]t remains our policy to minimize disincentives to investment, including artificially high pole attachment rates.").

[78] Specifically, (1) AT&T uses Duke Progress's reported "*Total* Utility Plant" investment for the "Gross Plant Investment (*Total* Plant)" input to the administrative and taxes elements of the carrying charge and when determining the accumulated deferred income tax ("ADIT") related to FERC Account 364 versus Duke Progress's use of a lesser value; and (2) AT&T uses the FCC's methodology to calculate the taxes element of the carrying charge versus Duke Progress's use of its own unsanctioned, fully-redacted approach. *See* AT&T Br. at 21-24 & Exs. 3-4; Duke Br. at 15-18. Duke Progress splits the parties' dispute over the "Total Plant" value into two arguments—one about the ADIT calculation and the other about carrying charge components. Duke Br. at 15-17.

[79] 47 C.F.R. § 1.1413(b); *see also* AT&T Br. at 17-22; Reply Ex. A at ATT00352-355 (Rhinehart Reply Aff. ¶¶ 12-14).

about 1.51 times the new telecom rate.[80] And, likely because the Commission precluded such gamesmanship with respect to the new telecom rate formula, Duke Progress asks the Commission to adopt Duke Progress's methodology for calculating new telecom rates, which produces new telecom rates about [redacted] *higher* than its old telecom rates.[81] None of this is possible. By regulation, AT&T "may be charged no higher than the rate determined in accordance with § 1.1406(d)(2)" and its presumptive inputs, which also set the just and reasonable rate for all "other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[82]

## III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's other filings, AT&T respectfully requests that the Commission grant AT&T's Pole Attachment Complaint in full.

Respectfully submitted,

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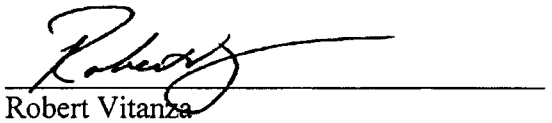
[80] *Pole Attachment* Order, 26 FCC Rcd at 5337 (¶ 218); *see also* Reply Ex. A at ATT00349 (Rhinehart Reply Aff. ¶ 5).

[81] *See* Duke Br. at 23 (incorporating Answer ¶ 37); Reply Ex. A at ATT00356-357 (Rhinehart Reply Aff. ¶ 17); *Cost Allocator Order*, 30 FCC Rcd at 13741-43 (¶¶ 22-25) (eliminating "artificial marketplace distortions" resulting from average number of attaching entities input).

[82] 47 C.F.R. § 1.1413(b); *see also In the Matter of Views on Learning, Inc.*, FCC 21-1, 2021 WL 100415, at *15 (FCC Jan. 7, 2021) ("[I]t is elementary that an agency must adhere to its own rules and regulations."). Duke Progress claims that proper application of the new telecom rate formula would discriminate against AT&T's cable competitors. Duke Br. at 23 (incorporating Answer ¶ 37). It would not, as the new telecom rate is the maximum rate for use of Duke Progress's poles by "any telecommunications carrier *or cable operator* providing telecommunications services." *See* 47 C.F.R. § 1.1406(d)(2).

## RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Reply Supplemental Brief and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



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## CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, I caused a copy of the foregoing Reply Supplemental Brief to be served on the following (service method indicated):

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# Exhibit 1